GENERAL AIR FORCE COUNSEL

FRAUD FACTS

DEPUTY GENERAL COUNSEL (ACQUISITION) ***No. 3, April 1997***

This is the third edition of ***FRAUD FACTS***, a biannual newsletter from the Air Force Deputy General Counsel (Acquisition) (SAF/GCQ). The purpose of the newsletter is to provide information and feedback to Acquisition Fraud Counsel (AFCs) at all levels concerning the ongoing operation of the Air Force's Procurement Fraud Remedies Program.

AIR FORCE EARNS KUDOS FROM DOD/IG

On March 31, 1997, DoD/IG issued its report on the Coordination of Procurement Fraud Remedies Programs within the Department of Defense. The judgment of the Air Force program was two thumbs up! The DoD/IG report said the Air Force program was "well-organized and managed" and pronounced its case files "current and comprehensive." The report explained that the Air Force program is "thoroughly committed to pursuing remedies in the most efficient and effective manner."

Congratulations to all Air Force fraud fighters who put time and energy into making this program successful. Due to your efforts, the Air Force and the U.S. taxpayers win!!

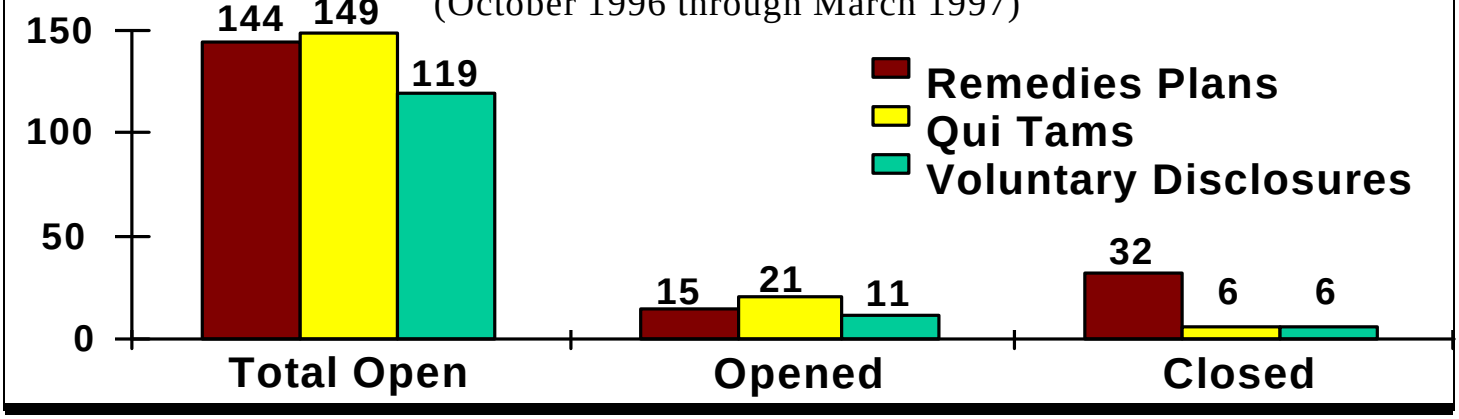
TOUHY OR NOT TOUHY?

Government agencies have regulations which govern the release of official information in litigation, commonly known as "Touhy Regulations," (named for Touhy v. Ragen, 340 U.S. 462 (1951)). DoDD 5405.2 and the services' implementing regulations, state that DoD components may determine if information originated by that component or people affiliated with that component may be provided in litigation. The Directive, codified in 32 C.F.R. part 97, governs the release of official information in litigation and testimony by DoD personnel as witnesses. Air Force guidance for the release of information and testimony by Air Force personnel in *qui tam* cases in which the government has declined to intervene can be found in AFI 51-1101, Chapter 3. Another Air Force resource is AFI 51-301, Chapter 9.

If you receive a request for a current or former government person to be used as a fact or expert witness in fraud litigation, or if you receive a request for information to be provided in litigation concerning a fraud matter, please contact SAF/GCQ. We will discuss the request with you and ensure that our response to the requester is appropriate and consistent with Air Force policy in these matters.

Air Force Procurement Fraud Cases

(October 1996 through March 1997)



ENVIRONMENTAL DEBARMENT CASES

By Jim Cohen, SAF/GCR

One of the largest problems facing our installations today is environmental contractors who perform poorly. Many times we find ourselves contracting for environment-related services such as waste removal or asbestos abatement only to find ourselves on the receiving end of a Notice of Violation when the contractor fails to properly comply with the various local, state, and federal laws in these or related areas. Contractors who either fail to perform environmental services or have been convicted of environmental crimes are subject to suspension and debarment as is any other contractor. This article should serve as a primer for field activities considering suspension or debarment of environmental contractors.

There are no special rules for the suspension or debarment of environmental contractors under the FAR. Contractors may, as a general rule, be debarred for three basic reasons: (1) a conviction or civil judgment, (2) poor contract performance, or (3) other reasons so serious or compelling that they affect present responsibility. Historically, cases involving environmental contractors fall into one of the first two categories.

SAF/GCR takes environmental cases very seriously. Every contractor recommended for debarment as a result of misconduct associated with any aspect of environmental contracting has been debarred when the matter was brought to our attention.

In a typical environmental case, a base becomes aware that a waste hauler is dumping in a neighbor's backyard and not in the approved disposal area 150 miles away. DoJ may act depending on the seriousness of the offense or the dollar amount involved. More likely, however, state environmental agencies will issue finding and notices of judgments against the contractor. In any event, forward the documentation to us; it will likely provide the basis for debarment. Contractors have been debarred based upon state environmental regulatory agency findings.

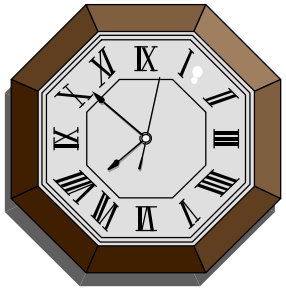
Where there has not been an adjudication, debarment is still possible if it is demonstrated that the contract required certain items or services and the contractor failed to perform. A contractor's failure to perform includes: not having required permits, not complying with local, state, and federal laws, and not complying with manifest requirements. The contractor is obligated to perform in accordance with laws and the contract requirements. The contractor's failure to do so may result in contractual remedies as well as debarment.

In cases where there is a Clean Water Act or Clean Air Act conviction, the Environmental Protection Agency (EPA) is statutorily required to list the facility that gave rise to the conviction as an excluded party. Such a listing precludes contract awards to that facility. Additionally, EPA has a debarment function that works similarly to that of the Air Force, and it has its own set of investigators. SAF/GCR maintains very good lines of communication with the suspension and debarment office at EPA.

No case is so clear cut that these few words can provide specific guidance. What is important is to know these remedies exist and to talk with SAF/GCR about the particulars of your situation before sending us documents or preparing debarment recommendation reports. Just give us a call. Our objective is to ensure that the Air Force contract only with presently responsible contractors and to assist you in making your input into the process as easy as possible. You can contact us at:

Steven A. Shaw, Deputy General Counsel
(Contractor Responsibility) DSN 223-9818
(703) 693-9818
E-Mail: ShawS@af.pentagon.mil
Jim Cohen, Counsel DSN 223-9819
(703) 693-9819
E-Mail: CohenJ@af.pentagon.mil
Lelia Smith, Paralegal DSN 223-9820
(703) 693-9820
E-Mail: SmithL@af.pentagon.mil
Office Fax: DSN 227-4340; (703) 697-4340

FALSE CLAIMS ACT STATUTE OF LIMITATIONS



When reviewing a False Claims Act (FCA) lawsuit, remember to consider the statute of limitations. A FCA action must be filed within the later of the following two time

periods: (1) six years from the date of the violation of the Act, or (2) three years after the official of the United States charged with responsibility to act in the circumstances knows or should have known about the violation, but in no event longer than ten years after the violation of the Act. Accordingly, if the Government learns of a FCA violation less than three years after the misconduct, it has six years from the date of the misconduct to bring an action. If the Government learns of the violation three to seven years after the misconduct, it has three years from the date it learned of the misconduct to bring an action. If the Government learns of the misconduct after seven years, it has ten years from the date of the misconduct to bring an action.

For *qui tam* actions, one Circuit has interpreted the statute of limitations to require relators to file not later than three years after they, rather than the Government, know or should have known about the violation. U.S. ex rel. Hyatt v. Northrop Corp., 91 F.3d 1211 (9th Cir. 1996). In Hyatt, the court found the relator's April 30, 1993 complaint untimely because the six year general limitation had expired and the suit was filed more than three years after relator knew of the alleged wrongdoing (relator learned of the alleged fraud sometime before May 13, 1986). This Ninth Circuit ruling encourages relators to come forward expeditiously but does not have any effect on the United States' rights under the FCA.

REMEDIES WITHOUT A PLAN

DoDD 7050.5 and AFI 51-1101 require remedies plans for all "significant" procurement fraud cases involving Air Force contracts. But, did you know that over two-thirds of the active procurement fraud cases effecting the Air Force do not meet the significant case criteria? While remedies are pursued and monitored through remedies plans for "significant" cases, it is up to you to make sure the Air Force's interests are adequately protected in those cases which do not require a formal remedies plan.

The role of the AFC is especially vital in cases for which remedies plans have not been tasked. In these cases, the DoJ may be interested in criminal or civil proceedings and your input is valuable to the development of the case. On the other hand, since DoJ may not be interested in pursuing a small-dollar case criminally or civilly, the AFC may be the investigator's only source of legal advice and direction in cases which do not meet the significant case criteria. Lack of interest by DoJ should not dissuade you from pursuing a particular case since the contracting officer may still wish to take contractual action or SAF/GCR may be interested in a fact-based suspension or debarment action. Therefore, you can ensure that applicable contractual or administrative remedies are pursued even when DoJ declines to take criminal or civil action.

Our fraud remedies include the pursuit of applicable remedies in all procurement fraud cases, not just those involving large dollar amounts. If you have any questions regarding what to do in a particular case or your role in any remedies cases, consult AFI 51-1101 (paragraph 1.1.7 in particular) or give us a call.

THREE YEAR SUSPENSION UPHELD

Suspension is for a temporary period, pending the completion of investigation and any ensuing legal proceedings. FAR 9.407-4. The length of a suspension is event-driven, not set by regulation. That concept was recently affirmed in the decision in Frequency Electronics, Inc. v. United States, No. 97-230-A (E. D. Va. March 14, 1997).

This litigation arose from the Air Force's January 1994 suspension of Frequency Electronics, Inc. (FEI), a Long Island, New York manufacturer of precision timing devices. The Air Force suspended FEI following the indictment of the company and four employees, including the company president, on charges stemming from a termination claim on a classified contract. The company and the indicted individuals have remained suspended as legal proceedings have not been concluded. Over the past three years, Air Force efforts to resolve the suspension have been unsuccessful due to an inability to come to come to an agreement with FEI over the status of the indicted individuals, FEI's ethics program, and FEI's accounting practices.

Early this year, FEI informed the Air Force that unless the Air Force immediately lifted the suspension, FEI would pursue its legal remedies. The Air Force, lacking evidence of FEI's present responsibility, could not lift the suspension. FEI

sued the Government in the District Court for the Eastern District of Virginia.

FEI based its lawsuit on two main points: (1) a suspension could not exceed three years, the length of time to which FEI claimed debarments were restricted, and (2) continuation of the suspension for more than three years constituted a punishment for its alleged false statements, thereby implicating double jeopardy restrictions on the still pending criminal case.

The District Court found for the Government on all counts. The Court indicated that the clear language of the FAR regarding the length of a suspension—"until the completion of legal proceedings"—means precisely what it says. Further, the court found that the period of suspension was not punitive.

WHO INVESTIGATES?

If you, as an AFC, are tasked with responsibility for a procurement fraud matter, which investigator will you be working with? Most of the time it will be an agent from the AFOSI, but that is not always the case. The jurisdiction of the defense criminal investigative organizations (DCIOs) in procurement fraud cases is an issue that has received a lot of attention. Recently, the DoD/IG published new guidance on this subject—"Revised Interim Guidance for Criminal Investigations of Fraud Offenses Jurisdiction", October 23, 1996.

This guidance states that the Defense Criminal Investigative Service (DCIS) is primarily responsible for fraud matters involving OSD and its activities, JCS, all other defense agencies not specified elsewhere, DRMS and Defense Distribution Depots (with some caveats), and OCHAMPUS. DCIS is also responsible for suspected violations of the Anti-Kickback Enforcement Act that are required to be reported by contractors; kickbacks and bribery involving civilian employees of OSD, JCS, and the defense agencies; and any other investigations the DoD/IG considers appropriate.

Military criminal investigative organizations, such as AFOSI, have primary responsibility for contract actions awarded by that military department; some allegations of fraud involving activities of DRMS and Defense Distribution Depots OCONUS; activities at a specific installation; AAFES and NAF matters; fraud perpetrated against OCHAMPUS by military beneficiaries; construction funded by one Military Department; DODDS OCONUS activities; unified combat commands; NATO activities; and bribery of a military member or civilian employee.

To determine who should investigate other matters, the DCIOs have established working groups which use criteria found in the guidelines. These other matters include allegations against contractors having contracts with more than one military service; allegations involving top 100 contractors; violations of antitrust laws; and allegations of fraud in contracts awarded or administered by the Corps of Engineers.

The bottom line is that Air Force AFCs need to work with all DCIOs that have responsibility over matters that affect the Air Force. If a procurement fraud case is being investigated by the AFOSI, work with the agent to effectively combat the fraud. If there is no AFOSI agent involved, contact the agent from another DCIO responsible for the case and develop a working relationship. Provide support to that agent if needed as you would to an AFOSI agent. Finally, regardless of the DCIO handling the investigation, if you cannot get the information you need, please contact us.

WHO'S WHO @ SAF/GCQ

The Procurement Fraud Remedies Program attorneys at SAF/GCQ are:

John A. Dodds
DoddsJ@af.pentagon.mil
Kathryn M. Burke
BurkeK@af.pentagon.mil
Richard C. Sofield
SofieldR@af.pentagon.mil
Tel: DSN 227-3900 or (703) 697-3900
Fax: DSN 227-3796 or (703) 697-3796